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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EDISON ELECTRIC INSTITUTE, *et al.*,
Petitioners,

v.

DOUGLAS M. COSTLE, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

GEORGE C. FREEMAN, JR.
HUNTON & WILLIAMS
P. O. Box 1531
707 East Main Street
Richmond, Virginia 23212

HENRY V. NICKEL
(*Attorney of Record*)
F. WILLIAM BROWNELL
HUNTON & WILLIAMS
P. O. Box 19230
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20036
(202) 223-8650

Counsel for Petitioners
Edison Electric Institute, et al.

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QUESTIONS PRESENTED

(1) Whether the due process clause of the Fifth Amendment is violated by construing § 307(b) of the Clean Air Act, which requires that petitions to review be filed in the Court of Appeals within 60 days of a reviewable action, to foreclose judicial review of a final regulation where the Agency's interpretation of that final rule was unclear at the time of promulgation, and where the Agency, after expiration of the 60 day period, reinterpreted the rule to change substantially the rights of regulated parties.

(2) Whether EPA's response to a formal request for a definite interpretation of the Administrator's regulations, which response results in an interpretation of the rule which changes substantially the rights of regulated parties, can provide the basis for a petition to review under § 307(b)(1) of the Clean Air Act.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No.

EDISON ELECTRIC INSTITUTE
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION
ALABAMA POWER COMPANY
APPALACHIAN POWER COMPANY
ARIZONA PUBLIC SERVICE COMPANY
BALTIMORE GAS AND ELECTRIC COMPANY
BOSTON EDISON COMPANY
CAROLINA POWER & LIGHT COMPANY
CENTRAL AND SOUTH WEST CORPORATION
CENTRAL POWER AND LIGHT COMPANY
PUBLIC SERVICE COMPANY OF OKLAHOMA
SOUTHWESTERN ELECTRIC POWER COMPANY
WEST TEXAS UTILITIES COMPANY
CENTRAL HUDSON GAS & ELECTRIC CORPORATION
CENTRAL ILLINOIS LIGHT COMPANY
CENTRAL ILLINOIS PUBLIC SERVICE COMPANY
CENTRAL MAINE POWER COMPANY
THE CINCINNATI GAS & ELECTRIC COMPANY
COMMONWEALTH EDISON COMPANY
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.
CONSUMERS POWER COMPANY
THE DAYTON POWER AND LIGHT COMPANY
DELMARVA POWER & LIGHT COMPANY
THE DETROIT EDISON COMPANY
DUKE POWER COMPANY
FLORIDA POWER CORPORATION
FLORIDA POWER & LIGHT COMPANY
GEORGIA POWER COMPANY

GULF POWER COMPANY
GULF STATES UTILITIES COMPANY
HOUSTON LIGHTING & POWER COMPANY
ILLINOIS POWER COMPANY
INDIANA & MICHIGAN ELECTRIC COMPANY
INDIANAPOLIS POWER & LIGHT COMPANY
IOWA-ILLINOIS GAS AND ELECTRIC COMPANY
IOWA POWER AND LIGHT COMPANY
IOWA PUBLIC SERVICE COMPANY
KANSAS CITY POWER & LIGHT COMPANY
KENTUCKY POWER COMPANY
KENTUCKY UTILITIES COMPANY
MADISON GAS AND ELECTRIC COMPANY
MIDDLE SOUTH SERVICES, INC.
ARKANSAS-MISSOURI POWER COMPANY
ARKANSAS POWER & LIGHT COMPANY
LOUISIANA POWER & LIGHT COMPANY
MISSISSIPPI POWER & LIGHT COMPANY
NEW ORLEANS PUBLIC SERVICE, INC.
MINNESOTA POWER & LIGHT COMPANY
MISSISSIPPI POWER COMPANY
MONONGAHELA POWER COMPANY
NEVADA POWER COMPANY
NEW ENGLAND POWER COMPANY
NEW YORK STATE ELECTRIC & GAS CORPORATION
NIAGARA MOHAWK POWER CORPORATION
NORTHEAST UTILITIES SERVICE COMPANY
THE CONNECTICUT LIGHT AND POWER COMPANY
THE HARTFORD ELECTRIC LIGHT COMPANY
HOLYOKE WATER POWER COMPANY
WESTERN MASSACHUSETTS ELECTRIC COMPANY
NORTHERN INDIANA PUBLIC SERVICE COMPANY
NORTHERN STATES POWER COMPANY
OHIO POWER COMPANY
OHIO VALLEY ELECTRIC CORPORATION
OKLAHOMA GAS AND ELECTRIC COMPANY
PACIFIC GAS AND ELECTRIC COMPANY

PACIFIC POWER & LIGHT COMPANY
PENNSYLVANIA POWER & LIGHT COMPANY
PORTLAND GENERAL ELECTRIC COMPANY
THE POTOMAC EDISON COMPANY
POTOMAC ELECTRIC POWER COMPANY
PUBLIC SERVICE COMPANY OF INDIANA, INC.
PUBLIC SERVICE ELECTRIC AND GAS COMPANY
ROCHESTER GAS AND ELECTRIC CORPORATION
SALT RIVER PROJECT
SAN DIEGO GAS & ELECTRIC COMPANY
SOUTHERN CALIFORNIA EDISON COMPANY
TAMPA ELECTRIC COMPANY
TEXAS UTILITIES GENERATING COMPANY
TOLEDO EDISON COMPANY
TUCSON ELECTRIC POWER COMPANY
UNION ELECTRIC COMPANY
VIRGINIA ELECTRIC AND POWER COMPANY
WEST PENN POWER COMPANY
WISCONSIN ELECTRIC POWER COMPANY
WISCONSIN POWER AND LIGHT COMPANY
WISCONSIN PUBLIC SERVICE CORPORATION,
Petitioners,

v.

DOUGLAS M. COSTLE, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Edison Electric Institute, *et al.*, (hereafter "Electric Utilities") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on June 17, 1980. Order, *Edison Electric In-*

stitute, et al. v. *Environmental Protection Agency*, No. 80-1441 (D.C. Cir., June 17, 1980).

OPINION BELOW

A motions panel of the District of Columbia Circuit (Judges Mikva and Edwards participating) dismissed Electric Utilities' petition to review without opinion. Electric Utilities thereupon filed a Suggestion for Rehearing *En Banc*, which was denied without opinion. Copies of the order of dismissal and the denial of the Suggestion for Rehearing *En Banc* appear in the Appendix hereto (hereinafter referenced as "App. ——").

JURISDICTION

The judgment of the Court of Appeals for the D.C. Circuit was entered on June 17, 1980 (App. 3). A timely Suggestion for Rehearing *En Banc* was denied on July 22, 1980 (App. 4), and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutory and regulatory provisions are set forth in the Appendix:

1. Clean Air Act §§ 109, 110(a), 307(b), 42 U.S.C. §§ 7409, 7410(a), 7607(b) (Supp. I 1977) (App. 5-14).
2. 40 C.F.R. Part 58 (App. 15-91).
3. 40 C.F.R. Part 50 (App. 92-116).
4. 40 C.F.R. Part 53 (App. 117-131).

STATEMENT OF THE CASE

Under § 109 of the Clean Air Act, EPA has established federal ambient air quality standards that define the maximum permissible concentrations of airborne pollut-

ants necessary to protect the public health.[1] These standards are codified at 40 C.F.R. Part 50.[2] Section 110 directs that each state have a detailed regulatory program designed to assure the attainment and maintenance of these standards. If the states fail to act, EPA must step in and promulgate a program. Regulatory programs implementing § 109 standards, known as "state implementation plans," include both legally enforceable limits on emissions from existing plants and constraints on the construction of new plants. Violation of these requirements results in the imposition of criminal and civil sanctions.[3]

Petitioners, the Edison Electric Institute, the National Rural Electric Cooperative Association, and 84 individual utilities, either operate or represent operators of electric generating facilities throughout the United States. Those existing facilities owned by Electric Utilities and those under construction or planned are required to meet emission limitations implementing the ambient air quality standards. The more stringent the air quality standard, the more costly and burdensome the emission control requirement under the state implementation plans. In addition, the stringency of the standard will determine the pace of economic growth in many areas of the country.[4]

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[1] 42 U.S.C. § 7409 (Supp. I 1977). For convenience, all references to the Clean Air Act hereafter will be to the section numbers of the Act rather than the United States Code; citations to both appear in the Table of Citations.

[2] The Appendix to this petition contains the original Federal Register promulgation, which designated these regulations as Part 410 of 42 C.F.R. These regulations were later redesignated as Part 50 of 40 C.F.R. (36 Fed. Reg. 22384 (1971)) but were not substantively changed. References will hereafter be made to the Part 50 regulations, with parallel references to the original section number when helpful.

[3] Clean Air Act § 113.

[4] The leval of the air quality standard determines whether or not industrial facilities will be able to attain the standard, and if not,

It will also affect the feasibility and expense of converting existing generating capacity fired with imported oil to domestic coal, given the high sulfur content of most Eastern coal.[5]

The petition to review filed by Electric Utilities in the court below challenged EPA's response to a request for an official interpretation by the Administrator of EPA of the existing Part 50 sulfur dioxide (SO_2) ambient standard. In its response to Electric Utilities' request, EPA indicated that reporting requirements, promulgated in May 1979 and appearing at 40 CFR Part 58 (App. 15-91), changed the method for determining compliance with the Part 50 SO_2 ambient standard. This change results in a substantial tightening of the SO_2 standard.[6]

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what steps must be taken to attain the standard. A finding of nonattainment means, at a minimum, that emissions from existing sources must be reduced at considerable cost and that construction of new sources will be prohibited until the state or EPA imposes additional requirements for installation of control technology or limitation of production at existing sources which will insure attainment of the ambient standard. *See* Clean Air Act §§ 171-173. A "scrubber" used to remove sulfur dioxide from the stack gas of a power plant, for example, can cost hundreds of millions of dollars. And in some instances, compliance may require shut-down of the noncomplying facility. *See* Union Electric Co. v. EPA, 427 U.S. 246, 271-72 (1976) (Powell, J., concurring).

In attainment areas, which are subject to the "prevention" of significant deterioration" ("PSD") requirements, a lower effective ambient ceiling will curtail new growth. Clean Air Act § 163. This is so because, in these "clean air" areas, the PSD provisions of the Act prohibit new growth that would cause the ambient ceiling or the PSD "increments" to be exceeded, whichever is more limiting. Thus, the lower the ambient standard, the lower the growth permitted in those clean air aras where the ambient ceiling is the governing constraint.

[5] *See* ACKERMAN & HASSLER, *Beyond the New Deal: Coal and the Clean Air Act*, 89 YALE L.J. 1466 (1980).

[6] *See* text at 11 *infra*.

Electric Utilities intended to argue below that EPA's interpretation of its own rules was incorrect, and that, if EPA's interpretation were accepted, the Part 50 SO_2 standard would have to be set aside on procedural and substantive grounds. Since Electric Utilities' petition to review was dismissed without consideration of their brief on the merits, these substantive issues were never considered by the lower court. As the following statement of facts shows, the issues on the merits are closely intertwined with the jurisdictional issue raised by this petition.

In 1971, EPA promulgated a 24-hour national ambient air quality standard for SO_2. Those Part 50 regulations provide that compliance with the 24-hour standard is to be determined using "calendar day" averages. The 24-hour ambient standard and associated compliance determination method determines the stringency of the standard.[7]

In 1978, EPA began the process of gathering data to determine whether revisions to the Part 50 SO_2 ambient standard would be necessary. This review is required by § 109(a)(1) of the Clean Air Act, as amended in 1977. Electric Utilities have been active participants in the Agency's ongoing effort to collect data and analyze whether the standard should be made more or less stringent. EPA originally indicated that it would reach a decision on whether revisions were necessary, and if so what revisions, by late-1980,[8] but recently revised its projection to mid-1981.

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[7] *See* 40 C.F.R. § 50.4 (originally 42 C.F.R. § 410.4) and Appendix A, 7.1.2 (1979) (App. 99, 109). Under the 24-hour SO_2 standard, a violation occurs upon finding a second exceedance of the specified ambient concentration in a given year. With the calendar day compliance method, a maximum of 365 compliance periods a year is examined in determining whether the standard has been met. If the compliance determination method is changed to a running average method, the standard becomes more stringent. *See* text at 11 *infra*; App. 133-136.

[8] *See* 45 Fed. Reg. 44108 (1980).

Wholly apart from its study of the need for revisions to the Part 50 SO_2 standard, EPA promulgated in May 1979 its Part 58 regulations for reporting ambient air quality monitoring data under §§ 110 and 319 of the Act.[9] The stated purpose of the new Part 58 regulations was to standardize monitoring and reporting practices.[10]

A footnote in an appendix to the final Part 58 regulations referenced a document which, when read with the footnote in the appendix, indicates that 24-hour SO_2 concentrations should be *reported* using a "running average" method whenever continuous monitoring data are available.[11] Electric Utilities, having no objections to requirements for reporting SO_2 data, did not file a petition to review the Part 58 regulations.[12]

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[9] *See* App. 7. Section 110(a)(2)(c) of the Act requires that state implementation plans include "provision[s] for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator. . . ." (App. 9). Section 319 provides for establishment of standardized monitoring systems and reporting requirements, which must be incorporated into state implementation plans under § 110 "as soon as practicable."

[10] *See*, e.g., 44 Fed. Reg. 27558 cols. 1-2, 27567 col. 3, 27597 cols. 2-3 (1979) (App. 15-16, 53-54, 86-87). *See also* Electric Utilities' Request for Clarification of Interpretation (App. 137-139).

[11] *See* note 16 *infra*. Using the running average technique 8,737 24-hour periods in a year are reported.

[12] There is no inconsistency between reporting data using running averages and determining compliance using "calendar day averages," since running average data will include the 365 calendar day periods upon which compliance is determined. *See* Brief of Petitioners Edison Electric Institute, *et al.* (June 10, 1980), at 14 n.18, 17 n.22 [hereafter "EEI Br."]. (This brief was submitted to the lower court pursuant to Rule 31(a) of the Federal Rules of Appellate Procedure, and was appended to Electric Utilities' Suggestion for Rehearing *En Banc*. *See* App. 144 n.3.) In the past, EPA has introduced new reporting requirements in order to develop data

Electric Utilities learned in the fall of 1979, after the period for filing a petition to review the Part 58 regulations had expired, that a petition to review these regulalations had been filed and was being pursued by PPG Industries.[13] According to counsel for PPG Industries, this petition was based on a statement by a lawyer in the General Counsel's office that, in this attorney's view, the Part 58 regulations changed the method for evaluating compliance with the SO_2 standards from calendar day averages to running averages.[14] In Electric Utilities'

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for use in future rulemakings to modify existing rules. *See* App. 138 n.10. Since EPA did not mention Part 50 in this rulemaking, did not make any of the findings required by § 109 of the Act to modify Part 50 regulations, and currently had under study whether revisions to the Part 50 SO_2 standard would be necessary, Electric Utilities did not suspect that these new Part 58 rules could be considered anything other than what they purported to be—reporting requirements. *See also* note 16 *infra*.

[13] PPG v. Costle, Nos. 79-1708 *et al.* (D.C. Cir.). Under § 307(b) of the Act, a petition to review final agency action must be filed within 60 days of that action unless the "grounds" for review arise after the 60th day. Failure to raise challenges to final agency action within the prescribed time results in the preclusion of such challenges in future judicial review proceedings and in enforcement actions.

[14] PPG's petition was filed initially as a "protective" matter because it appeared that EPA Region V may have used running averages in determining that the 24-hour standard had been violated in Summit County, Ohio. After filing their petition, PPG counsel met with an attorney in EPA's General Counsel's office to discuss the petition. At that meeting, EPA counsel stated that, in his view, Part 58 was intended to impose running averages as the method for determining compliance with the SO_2 24-hour standard. *See* EEI's Opposition to Motion to Dismiss (May 19, 1980), at 5 n.5 (hereafter "EEI Opposition").

The Administrator of EPA has not delegated to the EPA regions or the General Counsel's Office the final responsibility to construe definitively EPA's Clean Air Act regulations or to resolve conflicts among them. Indeed, the Clean Air Act would seem to prohibit such a general delegation of responsibility since rulemaking authority is

view, this unofficial interpretation was not supported by the language of Part 58, conflicted with Parts 50 and 53 of EPA's regulations,[15] and was inconsistent with § 109 of the Act.[16]

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vested *exclusively* in the Administrator. Clean Air Act § 301(a)(1). Under the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (1976) (hereafter "APA"), a rule is defined to include "an agency statement of general or particular applicability . . . designed to . . . interpret . . . law or policy . . . ." 5 U.S.C. § 551(4) (1976). In the context of the Clean Air Act, therefore, it is appropriate to seek a definitive construction of EPA's regulations from the Administrator when faced with an informal interpretation of his subordinates. Finally, the case law of the District of Columbia Circuit indicates that a petition to review based upon an interpretation of a subordinate will be remanded for an official interpretation. *See* note 22 *infra*.

[15] Part 53 of EPA's regulations permits the use of measurement devices for purposes of compliance determination which are shown to produce equivalent results to the reference method. Thus, a candidate method for SO_2, to be equivalent, must produce a single integrated value each calendar day. Accordingly, the equivalency regulations direct that "no more than . . . one (1) 24-hour measurement shall be made per day." 40 C.F.R. § 53.32(f) (1979) (App. 129).

[16] *See* App. 5-7; EEI Br. at 49-58. As noted above, the language of Part 58 talks only of *reporting* continuous monitoring data on a running average basis. *See also* App. 137-139. Significantly, the discussion of the running average method appears in a separate "guidelines" document which is only referenced in a footnote to an appendix to the Part 58 regulations, which was never incorporated by reference into the Part 58 regulations, and which, to Electric Utilities' knowledge, never has been circulated publicly. Further, this guidelines document does not purport to amend the Part 50 standards, but only *recommends a "change"* in the method of determining compliance with the SO_2 standard to the running average technique in certain situations. The guidelines document notes that this change would result in a significant tightening of the standard, but cites no studies or data to support the need for, or benefits associated with, such a change. *See* App. 158-159.

It is curious that none of the participants in the Part 58 rulemaking would have discussed this alleged change to the Part 50

The central fact of this litigation therefore is that compliance with the 24-hour standard promulgated in 1971 was to be determined on a calendar day basis, and the language which, in 1971, established calendar day compliance has never been changed. Under the calendar day method, a violation occurs upon finding a second exceedance out of 365 possible values whereas, under the running averages method, a violation occurs upon finding a second exceedance from 8,737 possible values. EPA admits that, by increasing the number of compliance periods from 365 to 8,737, the stringency of the SO_2 standard would increase by up to *30-40 percent.*[17] Given the serious consequences of this entirely unanticipated application of the Part 58 rules, Electric Utilities petitioned the Administrator in November 1979 for an official, definitive interpretation of the Part 50 ambient standard to confirm that this standard required enforcement using calendar day averages.[18]

Electric Utilities asked the Administrator to act promptly on their request for interpretation of the Part 50 standards, citing the pending petition filed by PPG Industries for review of the Part 58 regulations. EPA

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ambient standards. An examination of the statement of basis and purpose of the final rules, however, sheds some light on this lack of comment. Nowhere in the statement of basis and purpose are the Part 50 standards discussed or are any of the findings required by § 109 of the Act to change the Part 50 standards (*i.e.*, that such revisions "are requisite to protect the public health" with an adequate margin of safety) made. In addition, the procdural requirements of § 307(d) of the Act which apply in proceedings to amend ambient standards were not followed. Indeed, since EPA was involved in wholly separate activity to determine whether revisions to the Part 50 standards were necessary, it seemed unreasonable to interpret the Part 58 rulemaking to effect changes to the Part 50 SO_2 standards.

[17] *See* App. 148 n.13, 159.

[18] App. 132-140.

counsel indicated to counsel for Electric Utilities, however, that the request for interpretation raised substantial questions that could not be responded to before the deadline for petitioners' briefs in the *PPG* case. Accordingly, Electric Utilities filed an amici brief in the *PPG* case informing the court below of the pending request for interpretation which, if acted upon favorably, could render moot the PPG petition.

The Administrator refused to respond personally to the request for interpretation and told his Counsel's Office to prepare a response. In March of 1980, EPA's Office of General Counsel, acting under authority of the Administrator, rejected Electric Utilities' interpretation and cited the respondents' brief in the PPG case, filed on March 14, 1980, as setting forth the Agency's official interpretation of these rules.[19] That brief construes the Part 50 and 58 rules as requiring enforcement of the Part 50 SO_2 standard on a running average basis.

On April 25, Electric Utilities petitioned the Court of Appeals for the D.C. Circuit to review the Part 50 SO_2 standard and Part 58 regulations as construed by EPA. The basis for this petition was two-fold. First, the Administrator's response to Electric Utilities' request was a final interpretation of the Part 50 and 58 rules. Such a final interpretation constitutes "final action" reviewable under § 307(b)(1). Second, EPA's March response gave Electric Utilities notice for the first time that the Administrator would enforce the Part 50 standard on a running average basis. Thus, this official interpretation provided "grounds" to review the Part 50 standards that arose after the sixtieth day.[20]

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[19] *See* App. 1-2. Briefing in the *PPG* case has been completed but argument has not been scheduled.

[20] Section 307(b)(1) provides in part that "if such petition is based solely on grounds ariisng after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise." *See also* note 13 *supra*.

On May 9, 1980, EPA filed a motion to dismiss Electric Utilities' petition to review, contending that the Court of Appeals had no jurisdiction over Electric Utilities' petition under § 307(b)(1) of the Act. Counsel for EPA argued that Electirc Utilities were appealing arguments advanced in the respondent's brief filed by EPA in the pending *PPG* case, which arguments are not "final agency action."

On May 19, 1980, Electric Utilities filed an extensive response pointing out that there would have been no basis for the motion to dismiss had the Administrator personally prepared a reasoned response and that EPA should not be allowed to defeat jurisdiction simply by choosing to respond to a request for interpretation by referencing a brief rather than preparing an independent response. Electric Utilities further explained why the court had jurisdiction over a petition to review that was based upon EPA's response to Electric Utilities' good faith request. On June 10, 1980, Electric Utilities filed their brief on the merits in accordance with Rule 31(a) of the Federal Rules of Appellate Procedure.

On June 17, 1980, a motions panel of the District of Columbia Circuit granted without opinion EPA's motion to dismiss Electric Utilities' petition to review. In acting on the motion, the court did not consider Electric Utilities' brief on the merits. Electric Utilities then filed a Suggestion for Rehearing *En Banc*, which was denied without opinion on July 22, 1980.

REASONS FOR GRANTING THE WRIT

Petitioners come to this Court because the dismissal without opinion of Electric Utilities' petition for review raises substantial questions of fundamental fairness, creates serious problems for the administration of justice, and directly conflicts with this Court's decision in *Harrison* v. *PPG Industries, Inc.*, —— U.S. ——, 48 U.S.L.W. 4585 (May 27, 1980).

Under section 307(b)(1) of the Act, the Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction to review ambient air quality standards and other nationally applicable final agency actions under the Clean Air Act. Under § 307(b)(2) of the Act, Electric Utilities may not challenge the validity of such actions in subsequent civil or criminal enforcement proceedings. Thus, no other court (save this Court on certiorari) may pass on the validity of these agency actions. This grant of exclusive jurisdiction imposes on the D.C. Circuit a special obligation to insure that § 307(b) is applied in a manner that assures fair treatment to those whose rights are affected substantially by actions reviewable only in the D.C. Circuit.[21] Where this obligation has not been fulfilled, this Court, as the only court which can review the decisions of the D.C. Circuit, should use its supervisory powers to correct unfairness. Here, the petitioners have followed the applicable precedents of the lower court. That court, without opinion, forever barred petitioners from securing review of a significant revision to an important regulation. Fundamental fairness, as well as considerations related to the proper administration of justice, should lead this Court to review the decision below.

I. Precluding Judicial Review of Definitive Agency Interpretations of Ambiguous Regulations Raises Serious Questions of Fundamental Fairness

Electric Utilities come to this Court having had their petition to review EPA's Part 50 ambient standard and EPA's official interpretation of that standard dismissed

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[21] This is especially important where the regulations in question have substantial economic implications. As members of this Court have noted, the risk of civil and criminal penalties, as well as possible citizens' suits under the Act, coupled with overly stringent standards could lead to the shutdown of an urban area's electric service. *See* Union Electric Co. v. EPA, 427 U.S. 246, 271-72 (1976) (Powell, J., concurring).

without opinion by the only court in the United States with jurisdiction to hear Electric Utilities' challenge. In attempting to secure from the head of the administrative agency his official interpretation of what appeared to be a readily resolvable conflict between two sets of administrative regulations, Electric Utilities followed the well established law of the D.C. Circuit encouraging, wherever possible, administrative resolution of such issues.[22] The interpretation suggested by Electric Utilities was consistent with the plain meaning of the Agency's regulations and with well established rules of construction.[23] At no time did EPA suggest that the request for interpertation was filed in bad faith. Indeed, EPA counsel indicated that a quick response to the request was not

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[22] *See* Atlantic Richfield v. FTC, 567 F.2d 96 (D.C. Cir. 1977); Oljato Chapter of the Navajo Tribe v. Train, 515 F.2d 654 (D.C. Cir. 1975). *See also* Utah Power & Light v. EPA, 553 F.2d 215, 219 n.17 (D.C. Cir. 1977). In *Atlantic Richfield*, the D.C. Circuit held that an interpretation of a regulation proferred by both industry counsel and agency counsel in litigation could not be accepted by the court because of "[t]he salutory and settled rule of administrative law that the Agency, and not the reviewing court, *is to be accorded the first opportunity to construe its own regulations.*" 567 F.2d at 103 (emphasis added). Accordingly, the D.C. Circuit remanded the rule to the Commission for "a clear and definitive interpretation . . . ." *Id.* In view of this holding, it was incumbent upon Electric Utilities to give the Administrator the opportunity to construe his Parts 50, 53 and 58 regulations before asking the lower court for review.

Similarly, in *Oljato*, the D.C. Circuit stated that before petitioning to review a previously promulgated rule on the basis of post 60-day developments, the Administrator of EPA should be given the opportunity to resolve the matter. 515 F.2d at 665-66. *Oljato* therefore required Electric Utilities to present to the Administrator the reported interpretation of his subordinates and to request that he reject that interpretation. Only after Electric Utilities' request was denied by the Administrator, giving rise to a definitive and official Agency position on these rules, could Electric Utilities ask the lower court to pass on the validity of the Parts 50 and 58 regulations and the Agency's construction of them.

[23] *See* note 16 *supra*.

possible due to the substantiality of the issues.[24] Thus, Electric Utilities properly sought the Administrator's interpretation before attempting to invoke the jurisdiction of the D.C. Circuit.

In spite of Electric Utilities' good faith effort to obtain administrative resolution of an apparent conflict in regulations created by an unofficial and informal interpretation of a subordinate of the Administrator, the court below has refused to hear any of Electric Utilities' arguments on the merits.[25] The court below did not even issue an opinion explaining the reasons for dismissing Electric Utilities' petition.[26]

Under § 307(b)(1), as applied by the court below, Electric Utilities are barred forever from challenging the validity of a change to the Part 50 SO_2 standard even though that change significantly increases the stringency of the standard. As a result, Electric Utilities must accept whatever emission requirements are adopted under § 110 if those requirements are needed to insure attainment of maintenance of the more stringent standard.[27] Nor, under § 307(b)(2), may Electric Utilities attack such emission requirements in subsequent civil or criminal enforcement proceedings on grounds relating to the validity of the SO_2 standard. In view of the pervasive

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[24] *See* text at 11-12 *supra.*

[25] This is curious, since resolution of the jurisdictional issue here in favor of EPA requires taking some position on the merits of the case—*i.e.*, whether or not the Part 58 rulemaking did amend the Part 50 SO_2 ambient standard. For this reason, Electric Utilities suggested that the lower court defer ruling on the jurisdictional issue until having heard the merits. *See* EEI Opposition to Motion to Dismiss at 20, 21 (May 19, 1980). The lower court, however, did not consider Electric Utilities' brief on their merits.

[26] When departing from an accepted practice, the court below should at least explain the reasons for rejecting that practice. *See* Moragne v. States Marine Lines, 398 U.S. 375, 403 (1970). *See also* text at 20 *infra.*

[27] *See* Union Electric Co. v. EPA, 427 U.S. 246 (1976).

impact that ambient standards have or the future obligations of Electric Utilities, serious constitutional questions are posed by precluding judicial review of a change to the SO_2 standard where Electric Utilities lacked notice that such a change had taken place until after the expiration of the 60 day period.[28]

It is inevitable that the meaning, scope and effect of every aspect of a new EPA regulation may not be clear at the time of its promulgation. Later interpretation is needed to resolve these ambiguities. In addition, a regulation may be seemingly clear at the time of promulgation and later given an interpretation which changes its apparent meaning. Applying § 307(b) so as to preclude judicial review when this occurs would enable the Agency to evade judicial scrutiny by "clarifying" or reinterpreting its rules without regard to the substantive impacts of such "clarifications."

In the instant case, Electric Utilities followed the established precedents of the lower court in seeking a definite administrative interpretation of ambiguous regulations before involving the jurisdiction of that court. If the order of the court below is allowed to stand, Electric Utilities will never be able to obtain review of the significantly more stringent standard resulting from the Agency interpretation of March 1980. Given the obvious

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[28] *See* Adamo Wrecking Co. v. U.S., 434 U.S. 275, 289-90 (1978) (Powell, J., concurring). As Justice Powell noted in his concurring opinion, the "limitation on judicial review imposed by the Clean Air Act would afford precariously little time for many affected persons even if some adequate method of notice were afforded." *Id.* at 290. In this case, the total lack of notice that Part 50 standards were being amended by the Part 58 rulemaking (*see* note 16 *supra*) should militate against acceptance of EPA's and the lower court's reading of § 307(b). *See also* Bowman Trans. v. Arkansas—Best Freight, 419 U.S. 281, 288 n.4 (1974); Ohio Bell Co. v. Public Utilities Comm'n, 301 U.S. 292, 300 (1937). Electric Utilities, of course, are not arguing that every agency interpretation is reviewable, but only those which substantially change the rights and obligations of regulated parties.

constitutional problems raised by this approach, § 307(b) must be read to permit judicial review in this and similar cases.[29] The failure of the lower court to write an opinion in this case, and the uncertainty this has created for those involved in practice before the administrative agencies and that court, make it all the more important that this Court decide the important question of the effect of § 307(b) of the Act in situations involving administrative interpretation of ambiguous regulations.

II. Requiring Immediate Appeal of Ambiguous Regulations Is Injurious to the Administration of Justice

In a broader sense, the order of the lower court sets a serious precedent affecting the administration of justice in future cases under the Clean Air Act. Electric Utilities have been active participants in all major rulemakings and litigation arising under the Clean Air Act since the Act was amended in 1977. Before this decision, Electric Utilities, as well as other participants in major environmental rulemakings, would decide whether to challenge a rule (and, if so, which issues to brief) on the basis of a fair and reasonable construction of the regulations in question. If ambiguity existed, petitioners would seek administrative clarification before invoking the jurisdiction of the federal courts.[30] Dismissal of Electric Utilities' petition to review is fundamentally incompatible with this approach to litigation.

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[29] It is well established that a statute must not be read to create constitutional problems when other readings are possible. *See, e.g.*, Johnson v. Robison, 415 U.S. 361, 367 (1974); U.S. v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971); U.S. v. Rumely, 345 U.S. 41, 45 (1953).

[30] This approach, of course, is the one suggested by the recent decision of this Court in Harrison v. PPG Industries, Inc., —— U.S. ——, 48 U.S.L.W. 4585 (May 27, 1980), and by the previous decisions of the D.C. Circuit in Oljato Chapter of the Navajo Tribe v. Train, 515 F.2d 654 (D.C. Cir. 1975); Atlantic Richfield v. FTC, 567 F.2d 96 (D.C. Cir. 1977); and Utah Power & Light v. EPA, 553 F.2d 215 (D.C. Cir. 1977).

Since the lower court is the exclusive forum for review of numerous major actions of the Administrator of EPA under the Clean Air Act, the approach suggested by the lower court's dismissal of Electric Utilities' petition will affect Electric Utilities' participation in all future Clean Air Act litigation involving national regulations. Under the lower court's decision, a new interpretation of a rule issued more than 60 days after its promulgation cannot be appealed *no matter how unreasonable.* To avoid foreclosure of judicial review, therefore, Electric Utilities will be forced to examine each regulation promulgated by EPA to determine its most unreasonable constructions. As a result, Electric Utilities will be forced to file "protective" petitions to protect their right to review, and they will be forced to brief more issues, based on suspected interpretations, in any appeal. Given the breadth and scope of the issues raised in major EPA rulemakings and the burdens imposed on the federal courts and those adversely affected by such rules in the management of such appeals,[31] such a proliferation of speculative and unwieldy litigation is highly undesirable.[32] Thus, it is critical that this Court decide whether the interpretation given § 307(b) by EPA and the court below is correct.

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[31] *See, e.g.*, Alabama Power Co. v. Costle, —— F.2d ——, No. 78-1006 (D.C. Cir. Dec. 14, 1979).

[32] Recent major cases under the Clean Air Act in which Electric Utilities were involved, such as the *Alabama Power* case, would have involved more parties and more issues had all those potentially affected by the rules hypothesized "worst case" interpretations instead of seeking administrative interpretations where doubt existed as to the meaning of the rule. In signalling that this practice should end, the lower court's decision will make the management of such cases substantially more difficult.

III. This Court Should Exercise Its Power of Supervision Because the District of Columbia Circuit Has Departed From Sound and Established Precedent

As noted above, in attempting to secure from the head of the administrative agency his official interpretation of the regulation in question, Electric Utilities followed the well-established law of the D.C. Circuit encouraging administrative resolution of such issues before invoking the jurisdiction of the federal courts.[33] As this Court has recognized:

> Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide to the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors.[34]

In this case, the lower court's departure from its previous practice of encouraging administrative resolution of ambiguous regulations has forever barred Electric Utilities from obtaining review of a significant revision to an important regulation. As discussed above, the action of the lower court raises serious constitutional questions as to the validity of the judicial review provisions of the Act as applied[35] and creates substantial uncertainty as to how participants in future administrative activities should proceed.[36]

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[33] *See* note 22 *supra* and accompanying text.

[34] Moragne v. States Marine Lines, 398 U.S. 375, 403 (1970).

[35] *See* text at 16-17 *supra*.

[36] *See* text at 18-19 *supra*.

Where the lower court has "departed from the accepted and usual course of judicial proceedings," this Court should exercise its power of supervision to insure that the departure by the lower court from established practices has not compromised the rights of individual parties.[37] This is especially important in this case, given the exclusive jurisdiction that the Clean Air Act vests in the D.C. Circuit to review nationally-applicable actions of the EPA. Where, as here, the lower court has failed to give any reason for departing from its established practice, this Court should exercise its discretionary jurisdiction to require the lower court to adhere to its established precedents and practice.

IV. The Decision Below Directly Conflicts With the Decision of This Court in *Harrison* v. *PPG Industries, Inc.*

Electric Utilities' petition sought review of an official interpretation of EPA's regulations issued under the authority of the Administrator and in response to a formal request for such an interpretation filed by Electric Utilities. Dismissal of such a petition conflicts directly with the recent decision of this Court in *Harrison* v. *PPG Industries, Inc.*, —— U.S. ——, 48 U.S.L.W. 4585 (May 27, 1980). In that case, decided eight days after Electric Utilities filed their Opposition to the Motion to Dismiss, this Court held that the response of a Regional EPA Administrator to a request for interpretation falls within the "any other final action" language of § 307(b)(1), and as such constitutes an adequate jurisdictional basis for a petition to review under § 307(b)(1) of the Act.[38]

The parties in the *PPG Industries* case did not dispute that the Administrator's response to the request for in-

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[37] *See* Rules of Supreme Court, Rule 17.1(a).

[38] 48 U.S.L.W. at 4587.

terpretation in that case was "final action" as that term is used in the Administrative Procedure Act.[39] In this case, EPA admits that if the Part 58 regulations are read as compliance determination requirements, the Part 50 SO_2 ambient standard is rendered substantially more stringent. There is little question that Agency action which clarifies or interprets previous regulations so as to change the substantive obligations of regulated parties is "final agency action".[40] The instant case therefore is substantially similar to the *PPG Industries* case.[41] Because of the conflict between the *PPG Industries* decision and the action of the lower court in the instant case, this Court should exercise its discretionary jurisdiction to review this case.

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[39] *Id.*

[40] *See, e.g.*, National Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 698-702 (D.C. Cir. 1971); Detroit Edison v. EPA, 496 F.2d 244, 248-49 (6th Cir. 1974); Donner Hanna Coke Corp. v. Costle, 464 F.Supp. 1295, 1303-05 (W.D.N.Y. 1979).

[41] Indeed, in the *PPG Industries* case, the Agency response to the petitioners' request for interpretation was found to be sufficient to vest jurisdiction *even though the response merely reaffirmed a previous EPA determination.* 48 U.S.L.W. at 4586. In the instant case, the response to the EEI request for interpretation represented the *first* official pronouncement by the Agency on the matter.

CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

GEORGE C. FREEMAN, JR.
HUNTON & WILLIAMS
P. O. Box 1531
707 East Main Street
Richmond, Virginia 23212

HENRY V. NICKEL
(*Attorney of Record*)
F. WILLIAM BROWNELL
HUNTON & WILLIAMS
P. O. Box 19230
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20036
(202) 223-8650

Counsel for Petitioners
Edison Electric Institute, et al.